N. MADHAVAN NAIR v. GOVERNMENT OF MALAYSIA

[O.C.J. (Chang Min Tat J.) November 18, 1975]
[Kuala Lumpur — Originating Summons No. 400 of 1975]

Constitutional Law — Emergency legislation — Emergency (Essential Powers) Ordinance, No. 1 of 1969 — Validity of — Whether Ordinance had been promulgated by the Agung — Consequent effect on Essential (Community Self-Reliance) Regulations, 1975 and other regulations — Federal Constitution, arts. 39, 40, 66, 150(1) to (3).

Evidence — Legislation — Gazette publication on face of it lacking authentication — Whether proof of promulgation by other means possible — Affidavit evidence — Evidence Act, 1950, ss. 74(a) and 78(a)(iii).

The applicant in this case, the Publicity Secretary of the Democratic Action Party, Youth, Malaysia, applied to court for a determination of the validity of the Emergency (Essential Powers) Ordinance, No. 1 of 1969 and the Essential (Community Self-Reliance) Regulations, 1975. The Ordinance as published in the *Gazette* notification did not (a) bear the public seal and (b) did not contain the formula and legend usually appended at the end of such Ordinances. Applicant contended that this meant that the Yang Dipertuan Agung had not assented to such Ordinance, that it had not been properly or at all promulgated and had not the force of law of the land. Applicant also contended that the Yang Dipertuan Agung had no power to make essential regulations and that the Prime Minister had no power to make orders under such regulations.

Held: (1) although the *Gazette* publication on the face of it lacked authentication, evidence of the due promulgation of the Ordinance could be proved *aliunde;*

(2) in this case the court was satisfied that the Ordinance was duly promulgated and has the force of law;

(3) that the Essential (Community Reliance) Regulations, 1975, could be and were validly made by the Yang Dipertuan Agung. *Osman & Anor.* v. *Public Prosecutor*[12] and *Eng Keock Cheong* v. *Public Prosecutor*[13] followed.

Cases referred to:-

(1) *Stockwell* v. *Southgate Corporation* [1936] 2 All E.R. 1343.

(2) *Clark* v. *Epsom R.D.C.* [1929] 1 Ch. 287.

(2A) *Government of Malaysia* v. *Mahan Singh* [1975] 2 M.L.J. 155.

(3) *J.K. Gas Plant Manufacturing Co. (Rampur) Ltd. & Ors.* v. *Emperor* A.I.R. 1947 F.C. 38.

(4) *Harla* v. *State of Rajasthan* A.I.R. 1951 S.C. 467 at p. 468.

(5) *State of Rajasthan & Anor.* v. *Sripal Jain* A.I.R. 1963 S.C. 1323.

(6) *Dattatraya Moreshwar* v. *State of Bombay & Ors.* A.I.R. 1952 S.C. 181.

(7) *Barsay* v. *State of Bombay* A.I.R. 1961 S.C. 1762.

(8) *State of Bombay* v. *Purushottam* A.I.R. 1952 S.C. 317.

(9) *Chitralekha* v. *State of Mysore & Ors.* A.I.R. 1964 S.C. 1823.

(10) *P. Joseph John* v. *State of Travancore-Cochin* A.I.R. 1955 S.C. 160.

(11) *Swadeshi Cotton Hills* v. *State Industrial Tribunal U.P.* A.I.R. 1961 S.C. 1381.

(12) *Osman & Anor.* v. *Public Prosecutor* [1968] 2 M.L.J. 137.

(13) *Eng Keock Cheong* v. *Public Prosecutor* [1966] 1 M.L.J. 18.

ORIGINATING SUMMONS.

Karpal Singh (*Henry Lee* and *G. Davidson* with him) for the applicant.

Abu Talib bin Othman (Senior Federal Counsel) for the respondents.

Chang Min Tat J.: I propose, for the sake of clarity, to deal with this application under headings:

1. *The applicant:*

He is a person of full age residing in Section 20, Petaling Jaya. He is also the Publicity Secretary of the Democratic Action Party, Youth, Malaysia.

2. *The scope of his application:*

He applies by originating summons for a determination of the validity of the Emergency (Essential Powers) Ordinance, No. 1 of 1969, hereinafter called the Ordinance and by extension, the validity of the Essential (Community Self-Reliance) Regulations, 1975, and for declarations of this determination, as well as for consequential orders. That, as far as the summons goes, is the scope of his application.

However, in his affidavit in support, he makes reference in particular to the Essential (Security Cases) Regulations, 1975, and also generally to other regulations which are all made under section 2 of the Ordinance. It is his belief in his affidavit that all these other regulations are invalid and of no consequence. No determination is however asked for in respect of them. The applicant refuses the invitation of Encik Abu Talib, learned Senior Federal Counsel, to include the Essential (Security Cases) Regulations 1975 in the determination. However, he appears to contend that The Essential (Community Self-Reliance) Regulations, as well as the other regulations depend for their validity on the Ordinance. It follows in his contention that they all stand or fall together. He says in effect: if the trunk is cut down, not merely one branch but all branches will fall. He therefore attacks the Ordinance as invalid and it is sufficient for him to bring into his fire the Essential (Community Self-Reliance) Regulations. The Essential (Community Self-Reliance) Regulations will be hereafter referred to as the Regulations.

A court must, in the interest of judicial discipline, necessarily determine a summons on the issues put before it by the summons itself. This determination will be limited to the Ordinance and the Regulations. This is also in accord with the desires of Mr. Karpal Singh, learned counsel for the applicant.

In view of this limitation placed by the applicant on his summons, for whatever purpose he may have in mind, no necessity arises for me to consider the references in his affidavit in support to the provisions regarding evidence and procedure in trials under the Essential (Security Cases) Regulations. They are contained in paragraphs 7 and 10. Having regard to the applicant's intention, these references should, of course, never have been made. They must be disregarded or regarded as struck out.

En passant, I would with respect remark that part of the difficulty of this case arises from the somewhat

imprecise use of language, resulting in a difference between the contentions in the affidavit and the questions posed.

3. *The standing of the applicant:*

It is settled law that the plaintiff in an action for a declaration must establish that he has an immediate personal interest in the subject-matter of the proceedings. In a matter affecting the public at large, a plaintiff must normally show that his own interests are in some way "peculiarly affected" by the defendant's conduct: see *Stockwell* v. *Southgate Corporation*[1] *per* Porter J. at pages 1351-2 and *Clark* v. *Epsom R.D.C.*[2]

The applicant says, however, he is "an aggrieved person" since his freedom of movement within Section 20, Petaling Jaya, in which he resides, is affected.

The fact is, as he himself acknowledges in his affidavit, that though the scheme has been launched, this Section 20 has not as yet been designated an operational area. He cannot therefore be affected in any way within this area. However it is correct that Kampong Kasipillay, Sentul, some distance away has been so designated and if he stays beyond the hour of midnight in this area, he will be under certain obligations to report, etc. He may not have to perform vigilante duty but to the extent that he may travel to this designated area, and come under the Regulations, I propose to accept his standing for the application he is making.

4. *The respondents:*

The respondents are named in person. The first is Tun Haji Abdul Razak, Prime Minister, Malaysia. The second is Tan Sri Abdul Kadir bin Yusof, Minister for Law and Attorney-General, Malaysia, while the third is Tan Sri Abdul Kadir bin Shamsuddin, Director-General, Rukun Tetangga (*i.e.* the officer directing the Community Self-Reliance operations).

Encik Abu Talib has taken a preliminary objection to their being named as the respondents, though the first and the third have filed affidavits. He contends that the proper respondent is the Government of Malaysia.

Mr. Karpal Singh, learned counsel for the applicant, does not seriously oppose.

In view of this, an order has therefore been made to substitute the Government of Malaysia for the three named respondents.

On further reflection, I may well have made a mistake. It may be that the Attorney-General and the Director-General, Rukun Tetangga, are proper respondents, by their office. However, my mistake is not of any consequence as I am sure that my determination will be nonetheless of meaning.

5. *The mode of the application:*

The application by originating summons is brought under O.54A r.1A of the Rules of the Supreme Court. This particular rule provides for the determination of "a question of construction of any written law." Mr. Karpal Singh still contends that the application comes within this rule, but with respect I cannot agree with him when the clear objective is to strike down the Ordinance as invalid. No construction is involved. However Encik Abu Talib has raised no objection to the form and is desirous for the matter to be heard and in this spirit, I shall not myself refuse to hear it, even though the application is brought to the court by a wrong procedure.

6. *The events leading to the Emergency Ordinance and the Regulations:*

Following hard on the heels of the General Election on May 10, 1969, certain events known generally now as the May 13 incident occurred. They prevented the summoning of Parliament and caused the Yang Dipertuan Agung to apprehend that a grave emergency existed whereby the security of the Federation was threatened. Consequently in exercise of the powers conferred on him by Article 150(1) of the Federal Constitution, the Yang Dipertuan Agung issued a Proclamation of Emergency dated May 15, 1969, and published as P.U.(A) 145 on the same day. By this Proclamation, a state of emergency was declared throughout Malaysia.

On the same day, the Emergency (Essential Powers) Ordinance No. 1 of 1969, was published under P.U.(A) 146. It was stated to be an Ordinance promulgated by the Yang Dipertuan Agung under Article 150(2) of the Federal Constitution. It recited the issue of the Proclamation. It also recited that the elections had not been completed and that the Yang Dipertuan Agung was satisfied that immediate action was required for securing public safety, the defence of Malaysia, the maintenance of public order and of supplies and services essential to the life of the community. It then proceeded under Article 150(1) to confer upon the Yang Dipertuan Agung the power to make regulations to be known generally as essential regulations. Without prejudice to the generality of these powers, certain essential regulations were spelled out in section 2(2). But it is quite clear that the Regulations in question are made squarely under the general power to make such regulations contained in section 2(1).

Nothing turns on the Proclamation. It is not argued for the applicant that this Proclamation is invalid or has not been properly proclaimed or that it is not still in force. Neither is it contended that it has not been properly laid before both Houses of Parliament in accordance with Article 150(3) or that any resolution has been passed annulling it or that it has been revoked. Mr. Karpal Singh for the applicant concedes the validity of the Proclamation.

7. *The apparent defect in the Ordinance:*

So far as it goes, there is nothing extraordinary in this Ordinance as seen in the *Gazette.*

However, when compared with other Emergency Ordinances, the *Gazette* publication differs in not including the formula usually appended at the foot of these other Ordinances. The usual form of the formula in this case would be in these words:

"Promulgated at Istana Negara, Kuala Lumpur, on the 15th day of May, 1969."

It would be followed by the legend of the signature, in this case,

"TUANKU ISMAIL NASIRUDDIN SHAH
YANG DIPERTUAN AGUNG."

8. *The Public Seal:*

The Ordinance does not bear the public seal. Ordinance No. 3 of 1969 is the only one of the several Emergency Ordinances to do so. The applicant in his affidavit refers to the absence of the public seal on the *Gazette* notification as if it vitiates the Ordinance, but his counsel Mr. Karpal Singh concedes that the public seal is required only for Acts of Parliament under Article 66(4). Since Article 150(2) is silent on the use of the public seal, he does not think he can contend that it is required for an Ordinance promulgated under this Article.

9. *Proof of the defect:*

The applicant relies on the publication in the *Gazette*. He is undeniably right. The Ordinance is a public document within section 74(a) of the Evidence Act and under section 78(a)(iii) proved by the *Gazette* which is printed by the authority of the Government. On the face of it, there is absent any allegation that the Ordinance has been promulgated by the Yang Dipertuan Agung.

10. *The applicant's submission or contention on the effect of the absence of such a legend:*

Mr. Karpal Singh contends that the absence of such a legend must necessarily mean that the Yang Dipertuan Agung has not assented to the Ordinance, that the Ordinance has not been properly or at all promulgated and it has not become the law of the land. He goes on to contend that it necessarily follows that the Yang Dipertuan Agung has not had and has not conferred on himself the power to make essential regulations, and in turn it means that the Regulations are invalid.

The Ordinance must therefore be seen to be the cornerstone, without which the whole structure of emergency rule since May 15, 1969 collapses.

Mr. Karpal Singh further contends, in the alternative, that even if the court is satisfied that the Yang Dipertuan Agung has promulgated the Ordinance, the publication in the *Gazette* under P.U.(A) 146 is not of what he has promulgated. There has been therefore no publication and the Ordinance has not become operative.

That is the pith and marrow of his attack on the Ordinance and the Regulations. It is also the whole substance of his contention. In the summons, however, he refers to the Regulations as being unconstitutional and therefore invalid. This reference must, I suppose, be read in the context of the applicant's affidavit and of the representations of his counsel. In both there is absent any argument of unconstitutionality and I must therefore take it that when he says the Regulations are unconstitutional, the applicant means that they have not been made according to the procedure laid down in the Constitution.

11. *The contention for the respondent:*

Government does not refer to the effect if the Ordinance is in fact and in law invalid as not being enacted, assented to, and promulgated. Government does not argue *ab inconveniente* despite the force there can be in such an argument.

It refutes however that the Ordinance has not been enacted, assented to or promulgated by the Yang Dipertuan Agung. It contends for its validity.

It also refers to the several cases decided in the courts of this country, including the Federal Court, which have ruled several essential regulations valid on the finding that the Ordinance is not unconstitutional. The latest is the case of *Government of Malaysia* v. *Mahan Singh*.[2A] In those cases the suggestions that the Yang Dipertuan Agung had not assented to the Ordinance and that there had been no due and proper promulgation of the Ordinance were however not raised and considered. These cases cannot therefore be of any authority against the contention of the applicant.

Encik Abu Talib also argues for a liberal construction to be put on the Ordinance. There is authority for such an attitude in the case of emergency Ordinances: see, for example, *J.K. Gas Plant Manufacturing Co. (Rampur) Ltd. & Ors.* v. *Emperor*[3] where Spens C.J. says at page 41:

> "It appears that no narrow construction such as might be applicable to the affairs of an English parish is to be applied to an Act passed to ensure the peace order and good government of a British Colony. Still less, in our opinion, should any such narrow construction be put upon any provisions of the old or present Constitution of India. Such Acts must be given a large and liberal construction."

But with respect, the question still is in the words of Article 150(2) whether the Yang Dipertuan Agung has promulgated this Ordinance. It is not so much a matter of construction as a finding of fact.

12. *Proof on behalf of the Government:*

Where the printing, as in this case, fails to disclose the assent of the Yang Dipertuan Agung, the simplest and easiest proof of such an assent would be the production of the original. Primary evidence could in certain circumstances be supplanted or implemented by secondary evidence. Unfortunately, the court is advised by an affidavit filed by the Director-General who as Chief Secretary to the Government of Malaysia, his appointment dating from January 1, 1970, has control over all documents relating to the affairs of the Government, including presumably, the original Ordinance, that the original has been misplaced and cannot now be found, even after a thorough search.

The Prime Minister of Malaysia, has however affirmed on affidavit. The relevant portion of his affidavit is as follows: —

> "9. I refer to paragraph 12 of the affidavit of K. Madhavan Nair and state that owing to the grave emergency threatening the security of the country during the 'May 13' incident, I personally presented the said Ordinance to His Majesty the Yang Dipertuan Agung at Istana Negara for his consideration and approval. Having considered the said Ordinance and after being satisfied that immediate action was required for securing public safety, the defence of Malaysia, the maintenance of public order and of supplies and services essential to the life of the community, His Majesty the Yang Dipertuan Agung approved the promulgation of the said Ordinance. His Majesty the Yang Dipertuan Agung signed the said Ordinance accordingly. Immediate arrangement was then made to print and publish the said Ordinance in the Government *Gazette*."

No oral evidence is adduced.

An application is however made to cross-examine the deponents on their affidavits. It is grounded on one simple ground, that there is no satisfactory explanation as to the loss of the original of the Ordinance. Despite a strong attempt to persuade me to accede to the request, I remain unconvinced that the reason for the loss, whatever it is, whether satisfactory or not, has anything to do with the question whether the Yang Dipertuan Agung has or has not signed and promulgated the Ordinance. Encik Abu Talib points out that May 15 was a day of great confusion when normal procedures could not be followed and offers this as the explanation for the loss of this important document. It is not unreasonable. But it does appear that the application is only an oblique attempt to challenge the deponents with the proposition that no such Ordinance was ever put before the Yang Dipertuan Agung. I need say no more than this: since the applicant is clearly in no position to put facts before the deponents but is merely relying on challenges, his application has not the slightest merit to justify me into making the order sought.

13. *Admissibility of the affidavits:*

Mr. Karpal Singh does not object to the admission of the affidavits, but as will be seen later in this judgment, there is good authority for the admissibility of the affidavits.

14. *Emergency Rule:*

By Clause (2) of Article 150 of the Federal Constitution upon the issuance of a Proclamation of Emergency by the Yang Dipertuan Agung under Clause (1), the legislative power which normally under Article 66 vests in Parliament becomes vested in the Yang Dipertuan Agung, who may as long as the Proclamation of Emergency subsists, and until both Houses of Parliament are sitting "promulgate ordinances having the force of law if satisfied that immediate action is required."

But while the legislative power has shifted from Parliament to the Yang Dipertuan Agung, the executive power of the Federation remains where it has always lain. By Article 39, the executive power of the Federation is vested in the Yang Dipertuan Agung and exercisable, subject to the provisions of any federal law and of the Second Schedule, by him or by the Cabinet. However Article 40 limits the executive authority of the Yang Dipertuan Agung to acting on the advice of the Cabinet or of a minister acting under the general authority of the Cabinet. It is only in certain matters, spelt out to be the appointment of a Prime Minister, the dissolution of Parliament and the requisition of a meeting of the Council of Rulers that he has a discretion.

Emergency rule which passes the legislative power from Parliament to the Yang Dipertuan Agung has not displaced his position as the Constitutional Monarch, bound by the Constitution to act at all times on the advice of the Cabinet.

15. *Meaning of the Promulgation:*

The Constitution does not lay down any exact procedure for the promulgation of Emergency Ordinances. All Article 150 says is that under certain circumstances the Yang Dipertuan Agung may promulgate ordinances having the force of law.

Promulgation is defined in the Shorter Oxford English Dictionary as publication or the official publication of a new law, ordinance, etc. putting it into effect. The verb "promulgate" means to expose to public view and transitively, to make known by public declaration, especially to proclaim some law or decree.

Mr. Karpal Singh relies on an American dictionary, which is new to me. The definition also refers to publication of a law. There is no essential difference.

The dictionary meaning of the word promulgation can lead however to some confusion of thought unless it is realised that an emergency ordinance such as Ordinance No. 1 of 1969 in the circumstances becomes law when it is promulgated by the Yang Dipertuan Agung. It is not so much a matter of assent which is implied by the fact of promulgation. It must then be published. The necessity for publication is said to be based on natural justice. In the words of Bose J. in *Harla* v. *The State of Rajasthan*[4] at page 468:

> "In the absence of any special law or custom, we are of opinion that it would be against the principles of natural justice to permit the subjects of a State to be punished or penalised by laws of which they had no knowledge and of which they could not even with the exercise of reasonable diligence have acquired any knowledge. Natural justice requires that before a law can become operative it must be promulgated or published. It must be broadcast in some recognisable way so that all men may know what it is; or, at the very least, there must be some special rule or regulation or customary channel by or through which such knowledge can be acquired with the exercise of due and reasonable diligence. The thought that a decision reached in the secret recesses of a chamber to which the public have no access and to which even their accredited representatives have no access and of which they can normally know nothing, can nevertheless affect their lives, liberty and property by the mere passing of a Resolution without anything more is abhorrent to civilised man. It shocks his conscience."

Therein lies the difference between an ordinance and an Act of Parliament. "Acts of (the British) Parliament are publicly enacted. The debates are open to the public and the acts are passed by the accredited representatives of the people who in theory can be trusted to see that their constituents know what has been done. They also receive wide publicity in papers, and, now, over the wireless. Not so (Royal) Proclamations (and Orders of a Food Controller) and so forth. There must therefore be promulgation and publication in their cases. The mode of publication can vary; what is good in one country may not necessarily be the best in another. But reasonable publication of some sort there must be," (*ibid*).

Now publication of Ordinance No. 1 of 1969 there undoubtedly was in the *Gazette*. Mr. Karpal Singh refers to section 18 of the Interpretation Act 1967. This section provides for the publication of the *Gazette* in parts but while it undoubtedly dictates the form in which the *Gazette* appears, the 1967 Act is relevant only to a consideration of Acts of Parliament and other laws which have been revised. It is not applicable to Ordinances. The relevant interpretation ordinance is the Interpretation & General Clauses Ordinance 1948 and section 47 thereof provides that all copies of the *Gazette*, purporting to be published by

authority and to be printed by the Government Printer, as this particular copy does, are evidence of the matters therein.

To come to the nub of the matter: having regard to the provisions of this section 47 and also to section 78(2) of the Evidence Act, it must be seen that the applicant's contention that (1) there has been no promulgation of the Ordinance by the Yang Dipertuan Agung since the *Gazette* print lacks authentication and that (2) it is so even if the Yang Dipertuan Agung has signed the Ordinance can logically be examined by a consideration of several questions. In my view they are (a) what is the effect of want of authentication in the *Gazette*, (b) whether the requirement of authentication in the *Gazette* is mandatory or directory, and (c) if directory, whether it is then subject to judicial enquiry and (d) if so, what is the nature of the proof required.

16. *Effect of want of authentication:*

Assistance cannot, unfortunately, be obtained from local cases, since all these years, it has escaped the notice of everyone that the *Gazette* does not purport to be promulgated by the Yang Dipertuan Agung and there has been consequently not a single case in our country on the validity of the Ordinance on this score. Reliance will therefore have to be on Indian cases on Articles 77 and 166 of the Indian Constitution. The first article provides in Clause (1) that all executive action of the Government shall be expressed to be taken in the name of the President and in Clause (2) that all orders and other instruments made and executed in the name of the President shall be authenticated in such manner as may be specified in rules to be made by the President and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the President.

Article 166 of the Indian Constitution makes similar provisions for State Governments.

Strict compliance with the requirements of Clause (1) in both Articles gives immunity to the order so that it cannot be challenged in a Court of Law on the ground that it is not an order of the President or Governor. But the bar to judicial enquiry in the latter part of Clause (2) does not exclude any other ground.

One is that the court can enquire whether a condition precedent has been fulfilled. This does not arise in this case. The conditions for the making of the Proclamation and the Ordinance are fully stated in the recitals. The applicant does not challenge that a grave situation did exist on May 15, 1969, whereby the security or economic life of the Federation was threatened. And in the light of the events that occurred on May 13 and the following days, he does not contend that immediate action was not required. He therefore concedes that the Proclamation is necessary and is properly made, but he says that the Ordinance has not been promulgated by the Yang Dipertuan Agung and cannot now be saved. He gives no authority, but of course no authority is necessary for a proposition founded on sound logic, given the original premise.

Several Indian cases establish that where an order or instrument is expressed in the name of the President but the form lacks authentication, the court may enquire into the validity of the order. In *State of Rajasthan & Anor.* v. *Sripal Jain*[5] the order of the Inspector-General of Police for the retirement of the respondent was not in the form required under Article 166. But the court held that:

"It is well settled that any defect of form in the order would not necessarily make it illegal and the only consequence of the order is that the burden is thrown on the Government to show that the order was in fact passed by it."

In *Dattatraya Moreshwar* v. *State of Bombay & Ors.*[6] S. R. Das J. held at page 185:

"Strict compliance with the requirements of Article 166 gives an immunity to the order in that it cannot be challenged on the ground that it is not an order made by the Governor. If therefore the requirements of that Article are not complied with, the resulting immunity cannot be claimed by the State. This, however, does not vitiate the order itself .... Article 166 directs all executive action to be expressed and authenticated in the manner therein laid down but an omission to comply with those provisions does not render the executive action a nullity."

In *Barsay* v. *State of Bombay*[7] it was held that where the order was impugned as not being made by the President and therefore not in compliance with the provisions of Article 77(2), it was open to the party to question the validity of the order on the ground that it was not an order made by the President and to prove that it was not made by the Central Government.

See also *J. K. Gas Plant Manufacturing Co.* v. *Emperor, supra,* at page 185.

17. *Whether directory or mandatory:*

A parallel consideration is whether the provisions are directory or mandatory.

In *State of Bombay* v. *Purushottam*[8] Bose J. said in delivering the judgment of the Supreme Court, at page 319:

"In our opinion, the Constitution does not require a magic incantation which can only be expressed in a set formula of words. What we have to see is whether the substance of the requirements is there."

Twelve years later, the Supreme Court of India in *Chitralekha* v. *State of Mysore & Ors.*[9] reaffirmed *Dattatraya* and *Purushottam,* and held —

"It is, therefore, settled law that provisions of Article 166 of the Constitution are only directory and not mandatory in character and if they are not complied with, it can be established as a question of fact that the impugned order was issued in fact by the State Government or the Governor."

Dattatraya was also followed in *P. Joseph John* v. *State of Travancore-Cochin*[10] where the Supreme Court held that Clauses (1) & (2) of Article 166 were only directory and non-compliance with them did not result in the order being invalid and that in order to determine whether there was compliance with these provisions, all that was necessary to be seen was whether there had been substantial compliance with those requirements.

Similarly *Barsay* held that Article 77(1) is only directory.

18. *The true interpretation:*

To sum up, I can myself find no better words than the following words of Subba Rao J. in delivering the judgment of the Supreme Court in *Barsay,* at page 1776:

"The foregoing decisions authoritatively settled the true interpretation of the provisions of Article 166 of the Constitution. Shortly stated, the legal position is this: Article 166(1) is only directory. Though an impugned order was not issued in strict compliance with the provisions of Article 166(1), it can be established by evidence aliunde that the order was made by the appropriate authority. If an order is issued in the name of the Governor and is duly authenticated in the manner prescribed in Rule (2) of the said Article, there is an irrebuttable presumption that the order or instrument is made or executed by the Governor. Any non-compliance with the provisions of the said rule does not invalidate the order, but it precludes the drawing of any such irrebuttable presumption. This does not prevent any party from proving by other evidence that as a matter of fact the order has been made by the appropriate authority. Article 77 which relates to conduct of business of the Government of India is couched in terms similar to those in Article 166 and the same principles must govern the interpretation of that provision."

19. *Proof by other means:*

It must therefore be taken as firmly established that proof aliunde is possible.

It is not necessary to canvass again all the cases cited earlier, but it is, I hope, sufficient to note that in *Sripal Jain,* the relevant file was produced, and in *Barsay,* oral evidence was received. What is more important is to note that affidavits were received in *Purushottam, Chitralekha* and also in *Swadeshi Cotton Mills* v. *State Industrial Tribunal U.P.*[11] In *Purushottam,* the High Court even adjourned the proceedings for affidavits to be filed. The Home Secretary made two affidavits, the second one when the first did not apparently satisfy the court. The court still considered that the Minister in charge should have made an affidavit himself. The view of the Supreme Court was:

"We do not intend to discuss this matter because once an order of this kind is unable to prove itself and has to be proved by other means, it becomes impossible to lay down any rule regarding either the quantum of evidence necessary to satisfy the court which is called upon to decide the question or the nature of the evidence required. That is a question of fact which must be different in each case.... (But) as we (sitting on appeal) are only asked to deal with general principles, all we need say as regards this is that it is not necessary in every case to call the Minister in charge. If the Secretary or any other person, has the requisite means of knowledge and his affidavit is believed, that will be enough."

20. *Application:*

Under Article 150(2) of our Federal Constitution, only the Yang Dipertuan Agung can promulgate an emergency ordinance having the force of law. The absence in the *Gazette* of any notification that the Ordinance No. 1/69 has been promulgated by him makes the Indian authorities particularly applicable. The weight of those authorities leads me to the conclusions that --

(1) the only effect of the want of authentication by the Yang Dipertuan Agung is that the question whether the Ordinance has been promulgated by him becomes open to judicial enquiry, and

(2) it has then to be proved, if at all possible, by affidavit or other evidence that the Ordinance was in fact promulgated by him.

The affidavit by the Prime Minister is therefore admissible and subject to its acceptance by the court, is capable of proving the promulgation by the Yang Dipertuan Agung of the Ordinance. The question of acceptance of the affidavit is, in my view, best seen in the surrounding circumstances of those times.

21. *The surrounding circumstances:*

The state of emergency which arose from the grave disturbances from May 13 onwards which the applicant says he is prepared to accept as a fact must mean that even in his estimation, the future of the country was balanced precariously on a razor's edge, that it was touch and go whether law and order would be restored and that extraordinary measures were required. The first measure was to give recognition to the emergency as the basis for emergency legislations and the exercise of emergency powers. This was secured by the issuance of a Proclamation of Emergency under Article 150(1). Again, the applicant, as I understand him, is prepared to accept that the Proclamation was necessary and properly issued and published. The next step would be for the Yang Dipertuan Agung to promulgate ordinances for, what I will call generically, rule by essential regulations. That would be effected by passing a parent ordinance which would enable the Yang Dipertuan Agung to make these regulations. The importance and the necessity of this ordinance are only too apparent. The Ordinance No. 1 of 1969 is such a parent ordinance.

As I have earlier shown, executive power is in the hands of the Yang Dipertuan Agung and his Cabinet. Though the Yang Dipertuan Agung is with customary and loyal courtesy asked to be pleased to promulgate the Ordinance, it is clear that he as the Constitutional Monarch does not refuse. He has no discretion in the matter but surely the events of those days were clearly sufficient and only too apparent to show the necessity for the Ordinance without any agreement.

22. *Other circumstances:*

Furthermore, the Yang Dipertuan Agung has on the same day, that is on May 15, 1969 in Emergency Ordinance No. 3 of 1969, amended the Ordinance. This shows quite clearly, as a matter of irresistible inference, that he has in fact promulgated the first ordinance in the same way as he has the amending ordinance, to which there is and there can be no challenge.

And again, the long-title to which Encik Abu Talib refers and which reads "An Ordinance promulgated by the Yang Dipertuan Agung under Article 150(2) of the Federal Constitution" is part of the Ordinance. A long title can in certain circumstances be used in the construction of the Ordinance. No construction arises in this case but it is clear from reading the Ordinance as a whole that the Ordinance has in fact been promulgated by the Yang Dipertuan Agung.

23. *Finding:*

In these circumstances, and having regard to the urgent necessity for the restoration of law and order, I cannot conceive how any reasonable man can refuse to accept the affidavit that the Government did lay the Ordinance before the Yang Dipertuan Agung

and the Yang Dipertuan Agung had promulgated it and that his approval was indicated by the simple expedient of appending his signature thereto. The circumstances lead reasonably to these conclusions, without applying the presumption of regularity of official acts, though it is applicable, and without considering other matters.

I therefore, on the law and on the evidence, find that the Yang Dipertuan Agung has promulgated and signed the Ordinance, that though the *Gazette* publication on the face of it lacks authentication, the Ordinance as published is the promulgation of the Ordinance within the meaning of Article 150(2). It is consequently, to my mind, an Ordinance having the force of law.

It also follows, in my view, that the Regulations are validly made.

24. *Judgment:*

My judgment is therefore that —

(1) the Emergency (Essential Powers) Ordinance No. 1 of 1969 has been promulgated within the meaning of Article 150(2) of the Federal Constitution and the Essential (Community Self-Reliance) Regulations, 1975, are not unconstitutional and not invalid,

(2) that the designation of Section 1, or for that matter any other area, as a Community Self-Reliance area under the Essential (Community Self-Reliance) Regulations, 1975, is not void, and

(3) the applicant like any other citizen or resident in the country is bound to comply with the provisions of the Essential (Community Self-Reliance) Regulations, 1975, as being the law of the country.

25. *Other prayers:*

Two other prayers are sought in the summons:

(1) That the Yang Dipertuan Agung cannot lawfully make regulations in the nature of the Essential (Community Self-Reliance) Regulations, 1975, under the Emergency Powers conferred upon His Majesty under Article 150(2) of the Federal Constitution;

(2) That the Prime Minister cannot lawfully make Orders under the Essential (Community Self-Reliance) Regulations, 1975.

Some arguments of sort are made in support of these contentions. It is first said that since Article 150(2) refers only to Ordinances and not Regulations, the Yang Dipertuan Agung has no powers under the Constitution to make regulations "in the nature of the Essential (Community Self-Reliance) Regulations, 1975."

This contention has been settled by the Privy Council in the case of *Osman & Anor.* v. *Public Prosecutor.*[12] The reference in that case was to the Proclamation of Emergency 1964 and the Emergency (Essential Powers) Act 1964 which was passed by Parliament then in session. The Privy Council held that "written law" in section 2(4) of the Act included the Constitution, as in the Interpretation & General Clauses Ordinance 1948 and that the Emergency (Criminal Trials) Regulations 1964 made under the Act were valid, even if it were the case that the Regulations were inconsistent with the Constitution, since the Act expressly stated that essential regulations might provide for amending, suspending or modifying any written law. See also *Eng Keock Cheong* v. *Public Prosecutor.*[13]

The case before me refers to the same Article in the same Constitution, a parallel Proclamation of Emergency and an Emergency (Essential Powers) Ordinance which differs from the Act in *Osman's* case only in that it has been promulgated by the Yang Dipertuan Agung and not passed by Parliament, Parliament not being then in session. The law is *in pari materia.* Indeed it is in identical terms. I am bound therefore by authority to rule that in law the Yang Dipertuan Agung can, in the circumstances, make regulations "in the nature of the Essential (Community Self-Reliance) Regulations."

Then it was said that Rule 49 of the Regulations which gives the Prime Minister power to make orders under the Regulations is bad. The same authorities dispose of this argument. It is not maintainable.

Result:

The summons is therefore dismissed with costs.

Application dismissed.

Solicitors: *Karpal Singh, Wong & Co.*